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MENTAL ATTITUDES OF BENCH AND BAR TOWARD REFORM IN JUDICIAL PROCEDURE CONTRASTED.

Judge Evans of the Supreme Court of Alabama in a dissenting opinion tells of his "one day thinking of the case" of Pollak v. Winter, 51 So. 998 (to which appears annotation at page 100 of 71 Cent. L. J.) and his becoming first "doubtful of the correctness of the opinion" in the case, and "on more thorough investigation convinced that the opinion was erroneous." Then, by way of further digression, he reveals why he did not "at first make the investigation which led to my (his) present conclusion."

In this digression he says: "Each judge has assigned to him four times as many cases as he can possibly investigate and write as should be done; especially, if he understands the law after he investigates."

From this he proceeds to say: "Our system of pleading is like an exogenous plant, whose capacity for multiplying limbs is only limited by the climate and the fertility of the soil. * * * * What the system should be in this state, could in my opinion best be devised, after a most thorough investigation into the workings of the different systems of pleading of the different states and countries of civilization by a body of men most learned in the law and altruistic in character. It may be true that the common law system had its snakeheads, but it seems to me that in nearly every instance where one has been cut off by our legislature, two have grown out to take its place."

The learned judge then proceeds to speak of an infinity in number of pleas, consistent and inconsistent, which may be filed under Alabama practice, and of requests for instructions in varying phraseology to the point that there is "probability that the jury is too much instructed to understand the instruction."

Thereupon he brings his digression to a close as follows: "Do I object to the system? I can't say that I do. While as a citizen and a judge I deplore it, yet as a lawyer and dialectician I rejoice in it. As a means for the administration of justice, its efficacy is to be doubted; while as an intellectual gymnasium its appointments could scarcely be improved upon."

We believe that, in general aspect, the portrayal of the Alabama situation may be considered by our readers applicable in other states, but we dissent from the view that members of the bar, as lawyers and dialecticians, may rejoice therein. Furthermore, we see little in the system as "an intellectual gymnasium" for special laudation.

The system fosters, it seems to us, astuteness more than acumen, expertness more than erudition, cheese-paring more than breadth, in interpretation and trivialties in literalness more than the spirit of a noble science.

Nevertheless, what the learned judge intimates about differing viewpoints of the practitioner and the judge on the subject of practice and procedure has in it some element of truth, even if we regard both as being or trying to be "altruistic."

The evil in our administration of justice is being as freely acknowledged by lawyers as by judges and with neither appears a more sincere desire to have this evil corrected. It is the *bent* of mind it has produced in the bar and the bench, which we imagine to exist and which we will attempt to portray.

At the threshold of this attempt we will assume that an environment in the evil has been created for practitioner and for court. It has produced exigencies, which have caused both to yield. It has made the practitioner devote no inconsiderable, if not the greater part, of his attention and effort to the obstructing, rather than the facilitating of the administration of justice. It has overwhelmed the court so that it cannot "possibly investigate" sufficiently to "understand the law." Therefore, the environment

accentuates these exigencies the more it is prolonged.

The bar has come to regard successful practice of law to consist in avoiding, and interposing obstacles to, a trial on the merits, notwithstanding that the shibboleths of the codes are that pleadings shall contain plain statements of facts constituting actions and defenses, and that they shall be fairly and freely construed in the interests of justice. This is not saying that they relish this style of success, but merely that it is the only way that is open to them under the lawless law that is to be administered.

In their Syssaphan efforts to roll stones of principle to the top of our system's hill, only to see them roll back to its base, if they are lawyers with ideals worthy to be cherished, their minds incline to the desire, that the machinery of justice shall be scientifically exact. Under any other plan they constantly encounter judicial whims they cannot anticipate and they reap discomfiture from rules as uncertain as the length of "the chancellor's foot."

Neither is the practitioner inclined to believe, that, because desultory or interested efforts have not produced a scientific system, which by reason of its certainty will insure the largest measure of justice, such a system is unattainable. The harder he struggles with a loose, disjointed, uncorrelated affair, the more he yearns for its opposite, and that for which one most yearns, the more clearly it appears in the horizon of endeavor.

Upon the judge the environment presses in a wholly different way. His prime purpose is in reference to a concrete result—the disposition of a cause on the merits. He thinks of precedents, but they are more like restraints than guides. It is natural to every man to believe, that he is possessed of an intuitive sense of justice which needs no prods or fetters. His inclination is to debate within himself in each case, whether he should go the length a precedent invites or stop at the point a precedent defines. If the precedent is not in accord with his own sense of justice, he is inclined to distinguish it away or squarely repudiate it. In a word he wishes to do justice, but it is his own justice he wishes to do.

Further than this, he wishes, if he can, to do justice in his own way, and rules and forms may seem to him either as merely declaratory of his own plan, and, therefore, largely superfluous, or he is impatient of them as making him do something he does not wish to do. Also the judge tires of unending discussion about the interpretation and practical application of these mere accessories of the law.

That a court cannot go directly to the heart of controversies it is established to decide, after it has tried so hard to end discussion about preliminaries, is a covert reflection on its intelligence, and it is merely human they should become weary about them.

Also it may be said that just as the practitioner is inclined to believe that fixed rules are the only safe course, judges may conceive themselves able to mould a less exact system into a good working plan.

At the same time, if judges were left to devise and formulate their own system, they would make each rule as universal as they could and one regulation consistent with another. There is sufficient disposition on the part of every one to try to do this much. The judge, like the counsel before him, wants certainty, but the judge may not care so much about its according with old precedents as the counsel. The judge would be willing to trust to the judiciary developing and correcting the accessories to justice, while the counsel might think that this development and amendment would endanger the harmony of an original plan.

Something, all agree, must be done. What is the best course to pursue? To our mind legislative tampering with a code is a distinct failure. Responsibility should be placed somewhere else. We believe there is but one of two methods left—either that suggested by Judge Evans or to devolve the duty on the judges of courts of record.

If Judge Evans' suggestion can be followed and we doubt greatly that it can, it is nevertheless a proposal for a theoretic plan. If judges at the start might not produce what might be in appearance so scientific, it could be more successfully corrected. And the bar, which has formulated everything that legislatures have ever enacted, could get before the judges a fairer hearing, in the making of a code, than they have ever had. The fact that judges are not chosen for life helps rather than hurts the plan we propose.

NOTES OF IMPORTANT DECISIONS

EQUITABLE CONVERSION—DIRECTION BY WILL TO SELL LAND AND DISTRIBUTE PROCEEDS.—We alluded at page 346 of 70 Cent L. J., to a decision by a federal Circuit Court, applying the doctrine of equitable conversion and now refer to a similar decision by Connecticut Supreme Court of Errors. Appeal of Emery, 76 Atl. 529.

The opinion says: "The doctrine of Equitable Conversion is an equitable one, adopted for carrying into effect, in spite of legal obstacles, the intent of a testator or settler. It is not a fixed rule of law, but proceeds upon fixed principles which take into account the result which its application will accomplish. It's application is, therefore, governed by somewhat different considerations, acording to the connection in which it is invoked. As applied in determining the devolution of interests attempted to be given by will, the overwhelming weight of authority is to the effect that a gift of the proceeds of a sale directed to be made by a testator will be regarded as a gift of personalty, even though the actual conversion of the property into personalty is definitely postponed till some future time, unless to do so will clearly defeat the intention of the testator or result in the evasion of some rule of law." For authorities on this question see note to Beaver v. Ross, 20 L. R. A. (N. S.) 65, 70.

It would seem that where the sovereignty forbids the holding of title to land by, for example, an alien, its policy would not be intended to interfere with any jus disponendi, as such, but to create a mere incapacity as to a certain character or class of property. Such a rule might really not interfere with testamentary intent at all, but rather to direct it. If it is contrary to public policy, that an alien should hold land, such only is what is forbidden. This public policy should not control private benefaction any further than is expressly stated. These observations seem a little inconsistent with the view expressed by us in our former note, but we hope always to derive some benefit from a sober second thought.

CARRIERS — ELEVATORS IN OFFICE BUILDING.—The case of Quimby v. Bee Bldg. Co., 127 N. W. 118, decided by Supreme Court of Nebraska treats the question of the degree of care imposed on the owner of an office building equipped with elevators as to passengers carried therein.

We discussed this question briefly at page 148 of 71 Cent. L. J., and suggested a distinction to which as yet we have not seen any allusion by any of the courts. This Nebraska case shows, that the plaintiff was a messenger boy conveying a telegram to a tenant in the building and he was injured by reason of his foot extending slightly beyond the floor of the elevator so that it was caught, as the elevator ascended, by the floor above. The claim was negligent construction of the elevator and negligence in the conductor to allow a boy of his age to stand in what the conductor knew was a place of danger.

The verdict for plaintiff was sustained on the theory, that the responsibility of the owner of the elevator was that of a common carrier.

Here it is seen, that the only right of the boy to be on the elevator was a derivative one viz: he was there invited because it was to the interest of the tenant, that he, as a member of the public, should have access to the tenant's place of business. A loiterer there would appear to be like one on a train without any rights of a passenger. But a passenger on a train is there in his own interest and by his own contract and for such as a railroad holds itself out to the public, and as such, he may compel the railroad to take him as a passenger. We think no one of the general public may compel an elevator to transport him from one part of the building to another.

But it may be said, that the obligations of a common carrier is not necessarily governed by this test, but it rather depends on the way one holds himself to all of a class of the public, as in the case of an elevator to all of the public who have business with tenants. These are surely invitees, but still there seems a difference between them and customers of a carrier. The tenants themselves are customers and those who go to them are presumptively their guests, that is, it is a part of the tenant's contract in renting a business office, that outsiders shall have the same

right to means of access to his office that he himself has.

It is a principle, that one may sue upon a contract made for his benefit, and this contract on the part of the tenant is for the benefit of himself and of those who wish to call upon him. Therefore it may be argued out, that, in final analysis, the visitor of a tenant stands contractually in as good a position as a tenant.

SIMPLIFICATION OF LEGAL PROCEDURE — EXPEDIENCY MUST NOT SACRIFICE PRINCIPLE.

President Taft said:

"The greatest question now before the American public is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use."

There has been no demurrer filed. He was none the less forceful, but more ornate than a distinguished person, who said: "For forms of law let fools contest, that which is best administered is best."

Assuming, then, that there does not exist a dissenting voice against the effort seeking to simplify, cheapen, expedite and make uniform the pleading and procedure of the state and federal courts, the controlling thought may very fortunately be the preparation, and agreement upon, that system very nearly producing the desired result and reasonably meeting with individual theories and inclinations. In its consideration, I know that we shall be free from that beligerent cocksureness that is the outcome of superficial or extemporized knowledge, and that there will be kept in mind the importance of pleading, its history, its traditions, its evolution, its difficulties and its dangers. The potency and the dignity of the law I need not say, is limited by the vehicle through which it is administered. At present, nearly 50 per cent of the efforts in court produce no result. This is one of the law's delays and a portion of the expense of litigation. The trouble is fundamental and lies in the government itself. The history of pleading is particularly the history of the government. The remedy, while recognizing constitutional rights and privileges, is to abolish technical pleading of law, require a limited pleading of fact and the bringing about of uniformity. This demands no departure from fundamental principles, no sacrifice of ancient landmarks, involves but slight surrender of individual inclinations, some study and preparation, but, as will subsequently appear, calls for and has always exacted a patriotism, a broadness of vision and that degree of unselfishness that tends to the uplift of humanity, the general good and the keeping ever in mind of that good old common law principle, of letting the record, and not the judge, regulate the procedure. Simple justice and civil liberty demand that that which is not juridically presented cannot be judicially decided.

Nor is it necessary that this end should be obtained at the sacrifice of certainty and stability or of long established principles and respected customs. It is not necessary to be revolutionists to be reformers. While banishing technicality, the simplicity sought to be attained could state the case in logical manner and with accuracy, free from subtlety; pleading the facts without the circumstances, omitting conclusions of law, and evolving a single issue of law and fact. Without indulging in the vain hope of the sciolist that every litigant may be his own lawyer, it is certain that pleading can be made as simple as it is now complex. But we must not be unmindful of the different schools of thought that enjoy the favor of ripe and patriotic scholars. Let us review the opinion of some of the ablest exponents of common law pleading. Doctor Tyler, in his preface to the American Work of Stephen on Pleading (3rd Am. ed. 1892), bitterly resented *any* departure from that ancient practice, looking upon such an effort as a heresy.

"The love of innovation," said he, "induced the state of New York some years ago to abrogate common law pleading and introduce a code of procedure for the regulation of litigation in her courts; and,

notwithstanding the lamentable confusion and uncertainty and the greatly increased expense which has thereby been brought into the administration of justice in that state, other states have followed in her track of barbaric impiricism. Mr. Justice Grier has, from the bench of the Supreme Court of the United States, rebuked the folly of abolishing common law pleading, and substituting the common sense practice, as it may be called, in its stead."

But, let Mr. Justice Grier speak for himself from his high seat of influence on the supreme bench:

"This system," said he, "matured by the wisdom of ages founded on principles of truth and sound reason has been ruthlessly abolished in many of our states, which have rashly substituted in its place the suggestions of the sciolists, who invent new codes and systems of pleading to order. But, this attempt to abolish species and establish a single genus is found to be beyond the power of legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, have been to destroy the certainty and simplicity of pleading and to introduce on the record an endless wrangle in writing, perplexing to the court, and delaying and impeding the administration of justice."

Mr. Charles O'Connor, publisher of the *Albany Law Journal*, in the year 1892, asserting that most of the lawyers coming to the bar in code states, are entirely ignorant of the principles of common law pleading and the distinction between equity and law thereby occasioned, comments as follows:

"It is truly laughable to one conversant with both systems to see the blunders into which lawyers of great ability, who have come to the bar within the last ten or fifteen years, sometimes fall in framing a declaration, plea, or subsequent pleading of common law in the circuit courts of the United States."

Some Other Efforts at Reform.—Seeing how the advocates of common law pleading look upon it as a fetish there will be no need of apology for the imposition of trying to aid the present efforts with the light of history, however ancient. It is consoling to know that the scholarly lawgivers of Rome spent nearly a century of constant application in reaching what was finally the Justinian code. That a keen sense of right and an abhorrence of wrong dominated the Roman mind in framing their laws, will not be disputed, though our English progenitors found the necessity of disagreeing for other reasons. It is well for us, then, to observe the origin and slow but certain evolution of pleading, that we may not err in departing from established customs entirely, nor treat them lightly, and that there may be retained that which recommends itself as in keeping with our own times. And it might as well be admitted that every generation is disposed to consider the problems of its day the most difficult of solution. To us it is given to profit, alike, by the failures and successes of two great peoples from whom we have inherited a rich legacy of precedents and traditions. There is neither necessity nor excuse for too great a mistake to be made. There are known in history, we are taught, two great systems of law, the civil law of Rome and the common law of England. All procedure must be adapted as vehicles for enforcing these principles. Except in the State of Louisiana, the states of the Union, it will be borne in mind, are influenced by the common law of England, if, indeed, the law of those states is not exactly the common law, except where modified or abrogated by statute.

Pleading and procedure more than all else, reflect the genius of a government. Considering first the procedure of the civil law, we find that there is impressed upon it the influence of the three great political periods of Rome, viz: The period of the Kings; the period of the Republic and the period of the Emperors. The evolution of the civil procedure, except for its imperialistic tendency, which will sufficiently appear, commands investigation in that it seems not to have been so much legisiative, as of a judicial growth. Of the civil law it has been said, "The written reason of the Roman law has been silently and stu-

diously transfused into all our modern legal and political life." But its pleading and procedure had no such foundation. We are told that in order to meet the various new business relations and changing conditions of society, at that time—

"That there was given to the chief judge ('Praetor Urbanus'), authority to provide new rules and orders applicable to special cases which might be brought before him." Let us see how it operated as told by a friendly historian: "If a person complained of an injury for which the old (then existing) law offered no remedy, the Praetor Urbanus could, upon a statement of facts by the party, allow him an action and put the facts, with a proper judgment upon them, into a certain formula, for the information of the *judex* to whom he referred the matter. In this way, through the jurisdiction of the Praetor Urbanus, new actions enforcing claims never before recognized by the law and new rules of law applicable to the changing wants of society, were established."

Now this sounded very much like making the law and the procedure to suit the case, so we observe, with gratification and gratitude, the beginning of an effort at some degree of stability and certainty. And it is desired to be asserted with all the emphasis possible that there is believed to be no greater menace to justice than arbitrary procedure as administered by a weak or subservient judge. Even with the undoubted protection of the old common law pleading, Chief Justice Marshall was inspired to exclaim: "The greatest curse ever inflicted by an angry Heaven upon an ungrateful and sinning people is a corrupt, dependent or an ignorant judiciary." Even those powerful judges felt the necessity of avoiding the appearance of evil. We find that:

"It became the custom for Praetors, on entering upon their office, to publish an edict declaring the principles upon which they intended to administer justice during the year of their praetorship. By this practice, the Praetor would appear to the suitors to be governed by pre-established rules and not to be influenced by the special interest of any particular case. His administration would, therefore, be felt as more impartial and just."

Whether it was or not, it had a sort of Christian Science effect in that it created a more contented state of mind, if not beneficial to the purse. These rules continued through the year of the term of the Praetor and were generally, though not necessarily, adopted by successive Praetors, "until, after many years," we are told, "a body of edictal law became as well established and as authoritative as if it had received the express sanction of positive legislation." But history is silent as to the cost to justice or to litigants before reaching that point of partial certainty. The defense for this procedure is that it sprung "from the spontaneous acts and opinions of the people," "that society in the modes of its workings declared the rules of its actions; and the Praetors gave them judicial sanction and thereby made them the law." This is the argument of all advocates of civil law procedure. Certainly there could be no firmer or sounder basis for either law or procedure if this be true and the rights of the suitors were protected. It happens, however, that "these new judicial developments of the law left it "in a shapeless and unwieldy mass," and of this we shall speak later. "Consequently," it was said, "there could be very little *fixed principle* in the law if it were left to mere judicial development." Without reference to the days of the republic, where some great principles were established, but following the trail through imperialism, let us note casually and observe the continuance of this policy from Augustus Cæsar and his successors, down to the days of the well-remembered Emperor Justinian, whose code is the distinguishing feature of the first half of the Sixth Century of the Christian era.

Upon the overthrow of the republic and the establishment of the empire by Augustus, we seem to find the first real contention regarding pleading and procedure which was of sufficient importance to make

its impress upon history. In its very incipiency Capito, a lawyer of enviable fame, "maintained that the forms of legal procedure as well as the jurisprudence itself, must each change to suit the period of progress and the new order of things."

Labeo, another great lawyer, "was utterly averse to changing the strict technical forms." We are told that this controversy, thus begun, lasted nearly a century and out of the strife arose the civil code. The records show that so many lawyers and jurists wrote about it, that the Emperor Valantinian III ordered that none should be given credence except five, and they only when unanimous. It is in order to say parenthetically—this history bears out the statement made at the beginning of this paper. This is the period of the empire when oratory was at a discount and it was the fashion to write instead. In criticism, therefore, it has been said of the civil law that the "Machinery for carrying it into effect has been confounded with the law itself," and that a constitutional principle of the latter is the dogma, "Whatever pleases the prince has the force of law." Certainly whatever of merit or fault it may have attained under the republic vanished with the edicts of the empire in the evolution that gave it its real substantial place.

The Common Law of England.—Now, let us turn to the common law—that which is the creation of the great English-speaking people. The common law of England found neither its birth nor its maturity under the conditions just described. Responding to the tempestuous demands of the Englishmen of that day whose Magna Charter evidences their love of liberty, precedent unconditionally bound the successor of each judge, providing no opportunity or excuse for a "personal ruling," as in the civil law. The day of the Praetor Urbanus was legally over. Thus, there became a fixed rule of decision and a stability and certainty which has ever marked it, down to this day. There was no arranging the procedure to suit the case, a thing horribly to be dreaded, nor the substitution of personal opinion for conclusion of law. But, that procedure suitable to the controversy, which had to be strictly followed, was required to be used by the pleader as a condition precedent to the right of appearance in court and the *probata* had to correspond with the *allegata.* It was as immutable as the Twelve Tables of the Roman Republic or the laws of the Medes and Persians. Thus, pleading became as nearly a fixed science as it were possible to make it and stood as a complete antithesis to the "personal" system in vogue under the Romans. "The common law, Mr. Stephen declares, "in broad contrast to the civil law, has always wholly repudiated anything as authority, but the judgments of courts deliberately given in causes argued and decided. For, says Lord Coke, 'it is one amongst others of the great honors of the common law that cases of great difficulty are not adjudged or resolved *in tenebris or sub silentio supressis rationibus,* but in open court; and there upon solemn and elaborate arguments.'"

Dr. Tyler, commenting upon this, says: "Nothing less elaborately learned and cautiously considered, than such a judgment of a court, has a legitimate place in the common law."

Nor is it believed that it has a decent proper place anywhere in jurisprudence. And it may be truthfully said that the law is meaningless when enforced, without regard to fixed rules of procedure, sanctioned by precedent, if not tradition. It is worse than meaningless when left to the pleasure or convenience of the court. It is an ever present temptation to a weak man. "The opinion of no lawyer, we are solemnly informed, has a place in the system of the common law. And this wise principle is never lost sight of by those bred in its spirit." This was an optimistic view, but there is no better evidence of its justification than the commentaries of Lord Coke. The statement will be borne out that they are not his personal opinions, but judicial interpretations to which he made reference. In his Second Institutes he criticises this weakness of the origin of the civil law "and

its many diversities of personal opinions" as being "like a sea full of waves."

Shall we then utterly abandon these great guiding principles of the common-law pleading for the sake of convenience, regardless of past traditions and future destiny; or, gratefully mindful of its service to the people of the two greatest countries, change it to alter present-day conditions? I feel that Dr. Tyler's spirit will be happy for giving it life. He said:

"Nothing but the solemn voice of the law itself, speaking through its constituted tribunals, is of any judicial authority. And how august is that authority reposing, as it does, upon the solemn decisions of courts which have administered justice in the very same halls for nearly eight hundred years; in vain shall we search the history of nations for a parallel to this state of law amidst the fluctuating vicissitudes of empire. It is this stability of law ruling over the prerogative of the crown and administering equal justice to the high and the low, through so many centuries that vindicates the frame and ordinary course of the common law to the consideration of the present time. * * * It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But, above all, it excludes private interpretations and controls the arbitrary discretion of judges. In the common law the principles of interpretation are fixed and certain. * * * The object of judicial proceedings is to ascertain and decide upon disputes between parties. In order to do this it is indispensable that the point or points presented for decision. * * * The rules of common law pleading are designed to in controversy be evolved and distinctly develop and present the precise point in dispute upon the record itself, without requiring any action on the part of the court for the purpose."

This statement is so clear as to come like a burst of light into the darkness: Without a special pleading in that behalf, it is difficult to draw out the real issue from the complicated mass of facts, in the confusion of a trial and there can be no singleness of issue evolving only one question, and it follows that such would not *become a part of the record itself.* The materiality and relevancy of the evidence cannot otherwise be regulated. Nor is it out of place at this juncture to point out the contrast of the civil law of Imperial Rome where, ascending from the inferior judge to the court of the palace, "the will of the prince had the force of law." Not so with the common law of England. It withstood the despotism at critical periods, of the very Crown itself, for, underlying it, "were those principles which are the essence of life." Cautiously then should one surrender that which was wrung from King John and embodied in Magna Charta and of which Bracton said: *"Rex non debet esse sub homine sed sub Deo et lege."* This became fixed and established during the Elizabethan period, though the Inns of Court organized for the study of the common law, were established during the reign of Edward the First. It was no sudden reform. Both Lords Bacon and Coke commended it as having "Within itself an inherent force of expansion and progressiveness. It consists of elementary principles capable of indefinite development in their application to the ever-varying and increasing exigencies of society. There are certain fundamental maxims belonging to it which are never departed from. These are the immutable bases of the system,"

And of these great protections against imperialistic tendencies it has been said:

"At the very time that the Tudors and the Stuarts were grasping at high prerogative the common law was maturing its vigor in the courts. Coke, one of their judges, did more to develop and *organize it for protecting the individual against arbitrary power,* than any man who has appeared in the progress of English society. In him the professional instinct of the common law had reached its sublimest sense of human right. He saw that the English constitution drew its whole life from the common law and was but the framework of its living spirit. In all the various revo-

lutions with their dark and dreary scenes of bloodshed, through which England has passed, the people have clung to that ancient law with a devotion almost superstitious." And then the author brings this great thought home to Americans, "When our forefathers," said he, "established governments in America, they laid their foundation on the common law. When the United Colonies met in congress in 1774, they claimed the common law of England as a branch of those indubitable rights and liberties to which the respective colonies are entitled. And the common law, like a silent Providence, is still the preserver of our liberties."

I am inspired to inquire if justice is so difficult and tardy in attainment or different in principle to-day? Have we come upon a time when the measure of right and wrong has changed in spirit or in letter? Even though that be so, considering the centuries of controversy over this subject, may we not well hesitate before abandoning the good in that which has stood between the citizen and the prince and is not to be undervalued in this land of political growth. If the most essential bulwark of our liberties is the judiciary is it not well that the guns manning it shall always point in the right direction, and that direction be always fixed? We may not hope to obtain an ideal pleading. Many ephemeral questions will always vex, yet let us deprecate the attitude of unreasoning antipathy, as much as the weakness of sentimentalism. If there be offered a choice between ways, the one with its pitfalls and obscurities marked and blazed would be preferred. There would be precedent and a fixed course to pursue.

Several Systems. — At present there seem to be four distinct systems: (1) The old common law pleading of England; (2) The English Common Law Practice Act of 1873; (3) Common law pleading as modified by the statutes of the states, in which it is in vogue, and (4) An arbitrary legislative codification of rules of procedure, bearing the pseudonym of "Code pleading."

On considering the first, it is not surprising to find that the English people have not been idle. In 1852-60, there was passed a common law practice act which, with certain statutory modifications, continued in force until 1873, when the "Judicature Act" was passed. This statute is said to have been prepared by Lord Chancellor Selborne and certain associates from both the bench and the bar. The "Committee on Amendment of Practice" of the Virginia Bar Association, adopted the comments of W. Blake Odgers, Q. C., (Vol. 2, 2nd ed. Enc. of the Law of England). They are here given as the best exposition of that law:

(I.) "Forms of action were abolished. * * * He is now allowed to state the facts on which he relies, and the court will grant him the remedy to which on those facts he is entitled.

(II.) Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learned that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: 'For money received by the defendant to the use of the plaintiff.' A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading which set of facts would be set up at the trial, to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff must plead the facts on which he proposes to rely. * * *

(III.) "So, too, with the defense. 'The general issue' is abolished. In an action for goods sold and delivered, the defendant was formerly allowed to plead that he

'never was indebted as alleged.' This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of severally totally different defenses, e. g., that he never ordered the goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or that the statute of Frauds had not been complied with. Now a mere denial of the debt is inadmissible. So in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt a receipt to the use of the plaintiff.

"So in actions of tort, the defendant was formerly allowed to plead 'the general issue' 'Not guilty.' Under that plea it was open to him at the trial to raise several distinct defenses. Thus the defendant in an action of libel or slander by one short and convenient plea of 'Not guilty' simultaneously denied the publication of the words complained of, denied that he published them in the defamatory sense imputed by the innuendo, or in any defamatory or actionable sense which the words themselves imported asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. 'Not guilty' can no longer be pleaded in a civil action. The defendant must deal specifically with every allegation of which he does not admit the truth.

(IV.) "Demurrer were abolished. It is true that either party is still allowed to place on record an objection in point of law, which is very similar to the former demurrer. But there is this important difference. The party demurring could formally insist on having his demurrer separately argued, which causes delay. But now such points of law are argued at the trial of the action. It is only by consent of the parties or by order of the court or a judge that the party objecting can have the point set down for argument and disposed of before the trial. And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary.

(V.) "Pleas in abatement were abolished. If either party desires to add or strike out a party, he must apply by summons. No cause or matter now 'shall be defeated by reason of the misjoinder or non-joinder of parties.'

(VI.) "Equitable relief is now granted, and equitable claims and defenses are now recognized in all actions in the high court of justice.

(VII.) "Payment into court was for the first time allowed generally in all actions.

(VIII.) "The right of set-off was reserved unchanged; but a very large power was given to a defendant to counterclaim. He can raise any kind of cross-claim against the plaintiff; and in some cases even against the plaintiff with others, subject only to the power of a master or judge, to order the claim and cross-claim to be tried separately if they cannot conveniently be tried together.

(IX.) "The names of the principal pleadings were changed. A statement of claim takes the place of the former *declaration*. Instead of *pleas*, the defendant now delivers a defense, or it may be a defense and counterclaim. The *replication* is now called a reply. The further pleadings, which now are rarely seen, retain their ancient names: Rejoinder, surrejoinder, rebutter and surrebutter." (Pp. 161-2-3.)

Such, then, is the procedure of England to-day. Containing as it does all of the principles that justify its life, freed from the danger of subtlety and of the excessive rigour in which the rules are applied, bereft of all technicality as to questions of form and evolving a singleness of issue, the system possesses all of merit but one serious objection—it abolishes the distinction

between law and equity. It fits in with this exception, with the spirit of our laws.

No state of the Union has followed these forms, but many have absorbed the principles in framing their pleading and procedure. Some have taken the common law pleading as a basis and made alterations and additions to suit conditions and to expedite litigation, as did the state of Virginia. Unquestionably this last plan possesses every qualification looking to certainty and stability, except for the fallibility of political legislation. It has been said by a great publicist that the American Constitution, providing a government of checks and balances, being the final result of unselfishness, patriotic compromises and consideration of others, would be impossible in the present day and time of pocket patriotism. Without subscribing entirely to the pessimistic mood of that critical historian of his day, it is no discernable departure from prudence to look for substantial reform to other than political influences. It is not that one admires the system less, but fears the inability of obtaining it more. Politics have no respectable part in the administration of justice. Wherein, permit the Committee on Amendment of Practice of the Bar Association of Virginia, to bear witness (p. 104), "In the hurry of a short session of sixty days, it reported, 'it is almost impossible to get through even the best considered means relating to procedure. The true remedy is with the Court of Appeals, actively aided by the bar.'"

We turn now to "Code Procedure" with a double apprehension. Bereft absolutely of the principles, customs, forms, traditions and precedents of the common law we find ourselves wholly dependent upon the legislative whim. With all due respect to the many earnest, honest and well equipped men who compose those bodies, between want of preparedness and indifference, there is much to be feared, among other things the power, aggravated by the habit, of legislative changes. There is a great deal more in pleading than mere form. It stands, as has been endeavored to be shown as the bulwark of protection between the bench and the litigant; it fixes inviolate limitations within which the judge may rule, making all else *obiter dictum*, and, of equal importance, it confines the testimony which may be introduced. .How, indeed, could the counsel protect if he may not object and how may he object if there be no limits either to the *allegata* or to the *probata*. It follows as the night follows the day, that these must be governed by fixed rules and precedents, sacredly observed.

We have seen that the evolution, if not the history of pleading, is the history of government itself. It is not too much to say that upon it must depend the enjoyment of life, the pursuit of happiness and the acquisition of property. The doctrine of *res adjudicata* and the protection afforded by "due process of law" are made possible and are guaranteed by the principle, "that which is not juridically presented cannot be judicially decided." Civil rights demand this limitation upon court and government, and that a court may not act *sua sponte* except to prevent imposition upon its own jurisdiction. "The parties by their attornies make the record and what is decided within the issue is *res adjudicata;* anything beyond is *coram non judice* and void." "The courts cannot *ex moro motu* set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings" and as so presented. Neither the common law nor the statute of jeofails attempted to cure, after verdict, a deficiency not substantially apparent upon the record. This would be a deprivation of due process of law. It is possible and justifiable that defects and imperfections and, under very limited circumstances, even omissions in a pleading, in substance or form, fall within the doctrine of aider by verdict, here the issue, joined by consent, be such as to necessarily require proof of the imperfect or defective allegation. "It would be an imposition to extend the effect of acquies-

cence beyond a common interpretation of an allegation." But, we have the weight of the best authorities that defects of substance can never be waived. It has become a maxim. (Brooms Leg. Max., p. 136. Stephen on Pleading, p. 13, 6th ed.) Such is the protection to property, civil rights, civil liberty and justice furnished by pleading.

Lawyers' Duty to Court.—Now, we hear a great deal of very fine theory about lawyers responding to the highest ideals and helping the court in trials by seeking to bring out the merits and refraining from defeating justice with technicalities through taking advantage of any want of familiarity with the law of pleading and procedure. Do you realize what reaching this Utopia means? That the lawyer and student shall prepare the case of the legal sloth, or that the judge shall substitute that which is lacking. I do not know which is the greater promoter of evil. The first is against every principle of fair combat and the destruction of inspiration for and the effort at perfection in one's chosen calling. Be it said to the everlasting credit of lawyers that the closer their personal friendship the harder they fight each other as opposing counsel. The measure of success in combat is the extent of the defeat of an opponent. The trial of cases will prove no exception. The American heart and head and strong body is full of it. And, for one, I am unwilling to pay so dear a price as its sacrifice. For the court to prepare the pleadings and dictate the procedure jeopardizes civil liberty and creates in him a Praetor Urbanus, places an unwarrantable power in the hands of the judge and relegates us to the objectionable methods of the civil law. "For forms of law let fools contest that which is best administered is best."

THOMAS W. SHELTON.

Norfolk, Va.

MASTER AND SERVANT—RESPONDEAT SUPERIOR,

PHILADELPHIA & R. COAL & IRON CO. v. BARRIE.

Circut Court of Appeals, Eighth Circuit. March 23, 1910. 179 Fed. 50.

Where defendant, a coal dealer, in delivering coal from its yards to customers, hired from another dealer a team and a driver in the latter's general employ, paying a stipulated sum per hour for their services, and having full control and direction of the work and the method of its performance, the driver, while engaged in such work, was a servant of defendant, which was liable for an injury to a third person, caused by the driver's negligence in its performance.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Lenora M. Barrie against the Philadelphia & Reading Coal & Iron Company. Judgment for plaintiff, and defendant brings eror. Affirmed.

Before SANBORN and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was an action to recover damages for personal injuries alleged to have been sustained by the defendant in error, hereafter called the plaintiff, as a result of the negligence of the plaintiff in error, hereafter called the defendant. The record discloses the following facts:

The defendant had for some time prior to the accident been engaged in the general wholesale and retail coal business in the city of St. Paul, Minn., where various yards were maintained by it for storage, and from which coal was delivered in ordinary course to its customers as ordered. The defendant did not own its own teams, or furnish drivers in making local deliveries, but employed teams from other dealers from time to time. In this particular case it employed the team of one J. J. Martin, a dealer in coal in St. Paul, for which it agreed to pay him a certain amount per hour for the use of the team and driver, and agreed to settle with him twice a month for the number of hours his team or teams were employed in hauling and delivering the coal for the defendant. On the day of the accident to the plaintiff, Martin had furnished one of his teams to the defendant to haul coal for it, furnishing with the team a driver by the name of McQuistran. Further than furnishing the team and driver to deliver coal for the defendant at so much per hour for the time the team was actually employed, Martin had nothing what-

ever to do with the delivery of coal from the defendent's yards. The drivers, including McQuistran, received their instructions from the defendant as to the delivery of coal. The defendant directed from which of its yards the coal should be taken, how much, and where it was to be delivered, and issued all orders to the driver in connection with the delivery of coal to purchasers in various parts of the city.

On the 11th day of January, 1909, McQuistran, the driver, was directed by the defendant to deliver a load of coal to Tibbs, Hutchings & Co.'s store in St. Paul, and between 5 and 6 o'clock in the evening of that day he was engaged in unloading this load of coal, by shoveling the same from a wagon into a coal hole in the sidewalk in front of the store. The evidence shows that this coal hole, when not open for the purpose of delivering coal, was covered with an iron plate, or covering, set into the sidewalk a sufficient depth to bring the top of the upper side of the iron plate level with the top of the sidewalk. The plaintiff, as the record shows, was a customer at Tibbs, Hutchings & Co.'s store on the evening in question. She came out of the store with some bundles in her hands, and started to walk rapidly across the sidewalk for the purpose of taking a car to Minneapolis. She had only taken a few steps, when she fell into the open coal hole and was injured. Just what the driver was doing at the time plaintiff fell into the coal hole is not clear from the evidence. He testified that he noticed her as she came out of the store and stood for a moment on the steps, looking towards the street car, and did not see her again until he saw her prostrate on the sidewalk near the coal hole. Whether part of her body was in the coal hole he was not certain, but he testified that he thought not. He further testified that, upon discovering her, he went to her assistance, and, with the aid of another lady that came along at that time, lifted her up and helped her into the store. The evidence of all of the witnesses was to the effect that it was quite dark at the time the accident occurred, and the driver testified that the only guard placed about the hole to keep passers by from falling into it was a few chunks of coal which he had placed around it.

Several errors are assigned, but the one relied upon is that the Circuit Court erred in refusing the defendant's motion, at the close of all the evidence, to direct a verdict in its favor. This motion is based upon two grounds: First, that McQuistran, the driver, was not the servant of the defendant, but the servant of an independent contractor; and, second, that the plaintiff was guilty of contributory negligence. The defendant admits that the weight of authority sustains the action of the Circuit Court in submitting the issue of contributory negligence to the jury. This admission is in harmony with our views, and it becomes unnecessary, therefore, to discuss the second ground of the motion. Mosheuvel v. District of Columbia, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170, and cases there cited.

We come, then, to consider the first ground of the motion. The servant himself is, of course, liable for the consequences of his own carelessness; but when, as in this case, an attempt is made to impose upon the master liability for the negligence of the servant, it becomes necessary to inquire who was the master at the very time of the negligent act or omission. Standard Oil Co. v. Parkinson, 152 Fed. 681, 82 C. C. A. 29. It is elementary, notwithstanding the liability of a servant for his own negligence, that one employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant committed in the course of the service; but this is the extent of the master's liability. If the servent is engaged in work outside of the line of service for which he was employed, as, for instance, doing his own work, or doing the work of some person other than the master, the master is not liable for his negligence. The reason that the master, in any case, is held liable for the negligent acts of his servants is not because the servant, in his negligent conduct, represents the master, but upon the distinct ground that he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. Farwell v. Worcester & Boston Railway Corporation, 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

It is a rule universally recognized by the courts that, while one may be in the general service of another, yet he may, with respect to particular work, be transferred, with his own acquiescence, to the service of a third person in such a way that he becomes the servant of that person, with all the legal consequences of the new relation; and the question here is whether McQuistran was, under the facts disclosed by the record, the servant of Martin, his general employer, or the servant of the defendant, with respect to the particular work in which he was engaged at the time of the injury to the plaintiff. In discussing a similar question, the Supreme Court, in the case of Standard Oil Company v. Anderson, 212 U. S. 215, 29 Sup. Ct. 254 (53 L. Ed. 480), said:

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do

it, nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his executive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are for the time his workmen. In the second place, he who agrees to furnish the completed work, through servants over whom he retains control, is responsible for their negligence in the conduct of it, because though it is done for the ultimate benefit of the other, it is still in its doing his work.

To determine whether a given case falls within one class or the other, we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details, or the necessary cooperation, where the work furnished is part of the larger undertaking."

We think the facts disclosed by the record bring this case within the classification first mentioned in the case just cited, and that the Circuit Court correctly held that McQuistran, the driver, was the servant of the defendant at the time the plaintiff was injured. The evidence is undisputed that the only connection Martin had with the work there being conducted was to place the team and driver at the disposal of the defendant, to be used by it in its work, and to be under its exclusive control and subject to its orders, receiving therefor so much per hour for the use of the team and driver for the time engaged in the service of the defendant, not reserving to himself any control whatever over the team and driver in the performance of the work of delivering the coal. If Martin had agreed with the defendant to deliver a certain amount of coal at a given place, furnishing his own men and teams for the work, retaining control over them, and directing the manner in which the work should be conducted to completion, subject only to the general direction of the defendant as to the work to be done, we would have a case more nearly within the rule contended for by the defendant, and within the second classification mentioned in Standard Oil Company v. Anderson, supra.

We do not consider it necessary to review the numerous cases in which courts have had occasion to examine this question, but call attention to the following cases, in addition to those already cited, in which, upon facts not differing in principle from those before us, the same conclusion was reached. Waters v. Pioneer Fuel Company, 52 Minn. 475, 55 N. W. 52, 38 Am. St. Rep. 564; Singer Manufacturing Company v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; Atlantic Transport Company v. Coneys, 82 Fed. 177, 28 C. C. A. 388; Byrne v. Kansas City Railway Company, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; DeForrest v. Wright, 2 Mich. 367.

Finding no error in the record prejudicial to the defendant, the judgment is affirmed.

SANBORN, Circuit Judge (concurring). The question in this case is whether the Coal & Iron Company or Martin was the master of the driver, McQuistran, in the latter's performance of the specific act of protecting pedestrians from stepping into the coal hole in the sidewalk while he was unloading the coal into it. When a master who has and exercises the power to hire and discharge his servant lets him and a team to a hirer, to go where and to do such known work as the hirer directs, the legal presumption is that, although the hirer directs the servant where to go and what to carry, or haul, or do, the driver still remains subject to the control of his general employer in the method of his performance of the work to which the hirer assigns him, and the hirer is not liable, in the absence of an agreement to the contrary for the negligence of the servant in the method or manner of his performance of his service. Donovan v. Laing, [1893] 1 Q. B. 629; Delory v. Blodgett, 185 Mass. 126, 129, 69 N. E. 1078, 1080, 64 L. R. A. 114, 102 Am. St. Rep. 328; Driscoll v. Towle, 181 Mass. 416, 419, 63 N. E. 922; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 394; Brady v. Chicago & G. W. Ry. Co., 52 C. C. A. 48, 58, 114 Fed. 100, 110, 57 L. R. A. 712; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Quarman v. Burnett, 6 M. & W. 499; Jones v. Corporation of Liverpool, 14 Q. B. D. 890; Lewis v. Long Island R. R. Co., 162 N. Y. 52, 56 N. E. 548; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; Stewart v. California Improvement Co., 131 Cal. 125, 129, 63 Pac. 177, 724, 52 L. R. A. 205; Frerker v. Nicholson, 41 Colo. 12, 92 Pac. 224, 13 L. R. A. (N. S.) 1122.

If therefore, the proof in this case stopped with testimony that the Coal & Iron Company under its hiring had and exercised the power to direct the driver what amount of coal to

take, and where and when to take and to deliver it, this evidence, in my opinion, would not have overcome the legal presumption that his general employer, Martin, was liable for his negligence in his method of doing his work, and that the Coal Campany was free from liability. But the local manager of the Coal Company testified, regarding this driver and others, that these men were instructed to deliver the coal under the Coal Company's orders:

"Q. And the method of delivery is under your orders? A. Yes, sir. Q. Place, the time, the amount, and all, is under your orders? A. I have said so two or three times."

Because this testimony indicates that the control of the method of the performance of the work of protecting the coal hole while the driver was unloading the coal had been transferred by some agreement between his general employer and the Coal Company from the former to the latter, this case seems to me to be taken out from the general rule and presumption which have been stated, and to have been properly submitted to the jury, and for that reason I concur in the affirmance of the judgment.

NOTE.—*Responsibility for Negligence of Driver Who Also Performs Other Services for Hirer.*—The rule stated by Judge Sanborn, as a rule of presumption, seems not supported, by the cases he cites. Thus in the Delory case, where is a full review of the Massachusetts cases, it was held the borrower of the servant, who paid the general master for his time, was liable for his negligence where, although the servant as an expert workman acts on his own judgment, is directed by the borrower what to do. This case says: "The inquiry is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor. * * * If he has done nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and, in reference to the rights of third persons who are affected by the work, is his servant."

As we read this the presumption is precisely the opposite to that stated by Judge Sanborn. But to make this plainer, we quote further from the Delory case. "The rule applied when one furnishes for hire or lends to another a team of horses, with a driver, is simply an application of this principle. The circumstances are often such that, while the driver is the servant of the person to whom the team is furnished in reference to the question what he shall do or where he shall go, there is an implication, that, as to the management of the horses, he is the servant of his general employer, in whose interest and as whose representative he will manage and direct, within reasonable limits, such matters as pertain to the health and safety of the horses and the safety of the vehicle. In these particulars, for the preservation of his property, it will be presumed that the owner of the team retains in his driver the right of control." The question in the principal case was purely one of negligence of the driver as to the performance of what the hirer was alone interested. It concerned in no way the safety of horses or vehicles, only as to which is there said to be an "implication" or presumption of the driver remaining the servant of his general master. Passing over all Massachusetts cases prior to the Delory case, take the Shepard case, and we find Judge Knowlton, who wrote the opinion in the Delory case, also speaking for the court in the Shepard case. In the Shepard case it was held that, where the owner of an automobile lets it with a licensed chauffeur in charge of it, he is liable for an injury to a third person caused by the negligence of the driver in operating the car in obeying the orders of the hirer as to when and where he shall drive. That is a much less broad statement than Judge Sanborn makes, and the way the opinion reasons to liability of the owner, shows it is to be taken strictly as above stated. Thus Judge Knowlton, says: "In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in the business of which the person is in control as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result reached, but in reference to the method of reaching the result. * * * In the application of these principles to the hiring of a carriage with horses and a driver, to be used for the conveyance of the hirer from place to place, it has been held almost universally that in the care and mangement of the horse and vehicle, the driver does not become the servant of the hirer."

The Donovan case only decided that: "If a man lets out a carriage on hire to another, he in no sense places the coachman under control of the driver, except that the latter may indicate the destination to which he wishes to be driven." But that does not cover the case of the driver of a coal wagon who also is hired to deliver coal. As to his driving, the general owner is responsible, because in exercising care about that he is representing the owner of the horse and vehicle. In delivering the coal that owner has no concern.

The opinion in the Brady case was written by Judge Sanborn and he made the test that of power and control over the servant who is guilty of negligence and he assumes in this case that there being no express relinquishment by the general master to the hirer of control over the driver as to a duty other than that of driver, the presumption is he retained it, while the Massachusetts cases say this presumption only applies to the act of a driver as driver.

The Lewis case was in regard to the negligence of a driver as such, and the court, recognizing the rule as to the driver of a vehicle being the servant of his general employer, the owner of the vehicle, said "the fact that the driver may have received from the plaintiff or his associates, orders when to go forward and ston, did not make the plaintiff the servant of the defendant."

But, if he was to perform other services than what pertained to driving, as the driver of the coal wagon was, how would it be as to those other services?

But the Lewis case refers to prior New York cases, one of which helps, we think, to illustrate the point taken that the driver as driver was the servant of the owner of the team, while as coal heaver, he was the servant of the hirer. This case is that of Higgins v. W. U. T. Co., 156 N. Y. 75. In this case, plaintiff was the servant of a contractor for the repair of a building and the furnishing of an elevator. After the contractor had put in the elevator, sometime before an accident, but had not completed his contract, nor turned over the elevator to defendant and for all practical purposes still under the contractor's control, plaintiff wanted to use the elevator as a platform and procured defendant's general servant to operate it up and down for the convenience of plaintiff in plastering. By the neglect of this general servant in doing this, the plaintiff was injured. The general servant was held to be plaintiff's servant as to this work.

In the Joslin case the claim of negligence was as to driving which caused a collision with plaintiff's vehicle. The suit was against the hirer, and it was held that the master was liable if anyone. That case seems not to touch the question here. The Stewart case was where negligence was in allowing steam to escape from a steam roller and frightening a team. That is seen to be purely mismanagement of the owner's machine, but the opinion says: "The test in all these cases is, who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage?" Did the owner have anything to do about the delivery of the coal? We think not.

The Frerker case decides that a livery-stable keeper is liable for injuries to a third person by the negligence of the driver, where the hirer exercises no control over the driver other than telling him in a general way where to go. The inference from this principle seems greatly against the principle for the support of which it is cited. The injury was by a driver in suddenly starting his horses as plaintiff was about to alight.

In Brown v. Smith, 86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456, it was ruled that the owner of a team of mules who let them with the driver, was not responsible for the latter's negligence where the hirer had the right absolutely to control and direct the movements of the driver, to place him at other work if he wished and to discharge him and employ another driver in his stead if he so desired, but the hirer would be responsible for his negligence. That differs with this case, but it seems to us to go further in behalf of the owner of the team, than to say that for any work outside of driving, the negligence of the servant falls on another than the owner of the team.

It seems to us that the opinion by Judge Riner was right in proceeding on the line that the driver, so far as the particular act of negligence was concerned, was like any other employee, and that Judge Sanborn's statement is too broad. C.

CORRESPONDENCE.

BLACKSTONE VINDICATED.

Editor Central Law Journal:

In the last issue of the Central Law Journal (September 23rd), under the head, "Humor of the Law," you say:

"Two or three instructors at the Reserve Law School have been laughing themselves sick over the answer made by a student in an examination not long ago.

The question was to define a court of law. Blackstone, who was a good deal of a legal authority in his day, gives as his definition, "A place where justice is judicially dispensed."

The student may have had that definition in mind. But here is what he wrote:

"A court is a place where justice is judicially dispensed with."—Cleveland Plain Dealer."

The quotation of Blackstone's definition of a court is erroneous, and while the correction may spoil the joke, I feel it my duty to ask you to make the correction, inasmuch as Blackstone is dead and cannot defend himself. Blackstone's definition of a court is given as follows:

"A court is defined to be a place wherein justice is judicially administered."

(Cooley's Blackstone, 4th Edition, Book 111, page 23.)

Now, the "pun" on the definition is made by changing the emphasis on the last syllable of the word "wherein," which makes it appear to be written as follows

"A court is defined to be a place where injustice is judicially administered."

Hoping you will do Blackstone the justice of making this correction, I am

Yours truly,

N. B. MAXEY.

HUMOR OF THE LAW.

Two brother lawyers were trying a case before a rural justice of the peace in Arkansas, and there arose a question of the admissibility of evidence. The attorney for defendant read a passage from Greenleaf's first volume on Evidence, to sustain his point; and the justice of the peace was about to admit the offered evidence, when the attorney for plaintiff said: "Hold, let me show you that Greenleaf admitted, that all he said was not law;" and turning to the advertisement he read: "The work might have been much better executed by another hand, for, now t is finished, I find it but an approximaton towards what was originally desired."

"Now, he desired to write the law," continued the attorney, "but that is as far as he got; for he admits he only approximated it, and we all know that to approximate just means to get near to it. I'm surprised that my learned opponent should read from such an authority."

"That's what I think, too," remarked the justice, "and he can't expect me to follow it. Where a man says himself he has not found the law, how does he expect me to say he has got it right in his book? The evidence can't come in, and I give judgment for plaintiff."—Case and Comment.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Accord and Satisfaction**—Evidence.—If payment is the only affirmative defense, evidence tending to show an accord and satisfaction is inadmissible.—Crilly v. Ruyle, Neb., 127 N. W. Rep. 251.

2. **Action**—Demand.—The rule that where money is to become due only after demand plaintiff must prove demand, held not to apply where defendant denies all liability.—Cassidy v. Slemons & Booth, Mont., 109 Pac. Rep. 976.

3. **Attachment.**—Rights of Intervener.—Where an attachment property is sold and thereafter the action is dismissed, the court may determine rights of plaintiff under a chattel mortgage to the proceeds of the sale.—First Nat. Bank v. Livingood, Kan., 109 Pac. Rep. 987.

4. **Bankruptcy**—Attachment.—Where a claim to possession of property of a bankrupt's estate, as against the trustee's right of possession, is based solely on an attachment lien, which is avoided by the adjudication in bankruptcy, the person or officer so in possession is not an adverse claimant, but holds as bailee for the trustee, and must deliver the property on proper demand, and may be required to do so by a summary order of the bankruptcy court.—Staunton v. Wooden, C. C. A., 179 Fed. Rep. 61.

5.——Conditional Sale.—A Bankrupt's trustee acquires no title to property sold to the bankrupt under a conditional sale until compliance with the condition.—In re Pittsburgh Industrial Iron Works, D. C., 179 Fed. Rep. 151.

6.——Discharge.—A judgment for damages for willful and malicious injuries held a liability not affected by discharge.—Woehrle v. Canclini, Cal., 109 Pac. Rep. 888.

7.——Partnership.—Under Bankr. Act, Where only one of the members of a firm was adjudged a bankrupt, the partnership estate should be administered by the solvent partner not in bankruptcy.—Williams v. Lane, Cal., 109 Pac. Rep. 873.

8.——Preference—The giving of security by an insolvent contractor for government work, within four months prior to the filing of a petition in bankruptcy against it, to the surety on its bond to secure a loan of money used to pay the claims of laborers, held to be the giving of preference to a creditor which constituted an act of bankruptcy.—United Surety Co. v. Iowa Mfg. Co., 179 Fed Rep. 55.

9. **Banks and Banking**—Forgery.—Drawee of forged draft after paying it to a holder for value held not entitled to recover back the money.—State Bank of Chicago v. First Nat. Bank, Neb., 127 N. W. Rep. 244.

10. **Bills and Notes**—Interest.—A note payable on demand after date held not to draw interest before demand or commencement of action.—Van Vliet v. Kanter, 124 N. Y. Supp. 63.

11.——Negotiability.—A note is not rendered nonnegotiable by a provision that, "in case it becomes necessary to employ an attorney to collect this note, a further sum not exceeding 10 per cent. for fees" will be paid.—First Nat. Bank of Richmond, Ind., v. Badham., S. C., 68 S. E. Rep. 536.

12. **Cancellation of Instruments**—Cloud on Title.—Instruments, though void, will be canceled in proper cases if they cast a cloud upon title to land.—Gewin v. Shields, Ala. 52 So. Rep. 887.

13. **Carriers**—Bill of Lading.—Where the consignor of goods by express fails to place a value on the shipment, as called on to do by the bill of lading filled out by him, the alternative provision thereof, limiting the value to $50, will prevent any further recovery.—D'Arcy v. Adams Express Co., Mich., 127 N. W. Rep. 261.

14. **Contempt**—Conspiracy.—A conspiracy to commit a contempt of court is not in itself a punishable contempt.—Doniphan v. Lehman, C. C., 179 Fed. Rep. 173.

15. **Carriers**—Contract.—The rule that a contract by a carrier to transport goods for less than the published rate is illegal held not applicable, where there is a consideration for the contract, independent of the freight rate agreed upon.—Sultan Ry. & Timber Co. v. Great Northern Ry. Co., Wash., 109 Pac. Rep. 1020.

16.——Inspecting Shipments.—A carrier has the right to inspect proffered shipments and to refuse them when not in fit condition for transportation.—Atlantic Coast Line R. Co. v. Rice, Ala., 52 So. Rep. 918.

17.——Negligence.—A street car conductor with knowledge that a person is about to board his car held required to refrain from any act which would cause the car to be started, or its speed increased.—Orth v. Saginaw Valley Traction Co., Mich., 127 N. W. Rep. 330.

18.——Passenger.—The mere fact that a passenger is injured while alighting from a car is not sufficient to charge the carrier with liability.—Knuckey v. Butte Electric Ry. Co., Mont., 109 Pac. Rep. 979.

19.——Passenger.—Where a person is entitled to passage on a train he has a right to the protection due a passenger until he has safely alighted by the proper egress.—Florida Ry. Co. v. Dorsey, Fla., 52 So. Rep. 963.

20. **Chattel Mortgages**—Good Faith.—The burden is upon a second mortgagee, seeking to avoid a prior chattel mortgage not properly

filed, to prove that he became such mortgagee in good faith without notice.—Big Stone County Bank v. Crown Elevator Co., Minn., 127 N. W. Rep. 181.

21. **Contracts**—Construction.——Where there is doubt as to the meaning of words in an instrument, they must, if possible, be so construed as not to place one of the parties thereto at the mercy of the other.—Dunning v. Elmore & Hamilton Contracting Co., 124 N. Y. Supp. 107.

22.——Forfeitures.—Forfeitures, not being favored in equity, will not be enforced if couched in ambiguous language.—McCaskill v. Union Naval Stores Co., Fla., 52 So. Rep. 961.

23. **Corporations**—Capital Stock.—A corporation may sell its capital stock at par, and in good faith sell its personal property for a sum part to be paid in cash, and the balance, if paid at all, to be paid from dividends thereafter to be declared upon the stock sold to the vendee of the personal property in the same transaction.—Hathaway v. Vaughan, Mich., 127 N. W. Rep. 337.

24.——Foreign Corporation.—The statutes of this state do not require a foreign corporation to pay a fee for the purpose of bringing an action in the state, where it has never transacted business therein—Desserich v. Merle & Heaney Mfg. Co., Colo., 109 Pac. Rep. 949.

25.——Police Power.—The Legislature, in the exercise of its police power, may regulate the rate to be charged by a corporation doing business affected with the public interest.—Northern Light & Power Co. v. Stacher, Cal., 109 Pac. Rep. 896.

26.——A corporation authorized to hold real estate in fee may become lessee in a lease whose term exceeds the term of its charter existence.—Lancaster County v. Lincoln Auditorium Ass'n, Neb., 127 N. W. Rep. 226.

27.——Receiver.—Where the receiver of a foreign corporation, who was appointed ancillary receiver of the assets in this state, accounted in the foreign state, the order of that court approving his account would protect him here.—Strauss v. Casey Machine & Supply Co., 124 N. Y. Supp. 32.

28.——Stockholder.—That one is a stockholder and vice-president of a corporation without salary held not to preclude him from being employed as a salesman therefor and drawing a reasonable salary.—Friedrichs v. Friedrichs, Young & Taney, La., 52 So. Rep. 996.

29.——Subscriptions.—As a general rule subscriptions to capital stock must be for a definite number of shares.—Wheeler v. Ocker & Ford Mfg. Co., Mich., 127 N. W. Rep. 332.

30. **Criminal Law**—Insanity.—In cases of derangement, indications of infirmity frequently manifest themselves after a paroxysm of dementia, and for this reason evidence of recurring symptoms is admissible after the commission of an act asserted to have been perpetrated while laboring under mental exaltation or depression.—State v. Roselair, Or., 109 Pac. Rep. 865.

31.——Pleading.—One accused of burglary with intent to commit larceny may in a second count of the same indictment be charged with the larceny, and on such an indictment may be convicted and punished for either offense, but not for both; and where there is a general verdict of guilty he may be sentenced for the burglary only.—Halligan v. Wayne, C. C. A., 179 Fed. Rep. 112.

32. **Descent and Distribution**—Insurance.—Policies of insurance issued to insured on his own life held his separate property, going to his executors, subject to his widow's dower.—Burdett v. Burdett, Okl. 109 Pac. Rep. 922.

33. **Divorce**—Alimony.—Defendant in a suit for divorce held not in contempt for failure to pay temporary alimony, so as to bar his right to dismissal of the suit for want of prosecution.—Stone v. Stone, Mich., 127 N. W. Rep. 258.

34.——Alimony.—A separation agreement held not a bar to alimony.—Wright v. Wright, Mich., 127 N. W. Rep. 328.

35.——Condonation.—A complainant may be entitled to a divorce for extreme cruelty, notwithstanding condonation of defendant's misconduct.—Hazelton v. Hazelton, Mich., 127 N. W. Rep. 297.

36. **Dower**—Deed.—The conveyance by a widow of the lands of which she is endowed passes only her life estate, though expressed to be in fee, and the grantee will not hold adversely to the remainderman until the widow's death.—Anglin v. Broadnax, Miss., 52 So. Rep. 865.

37. **Easements**—Park.—Land included in a private park created by conveyances of the owner of a tract of land of which the park formed a part held required to be used exclusively for the benefit of the surrounding property.—People v. O'Donnel, 124 N. Y. Supp. 36.

38.——Presumption.—It will not be presumed that the grant of an easement is in gross, when the right can fairly be construed as appurtenant to some other estate.—Ballinger v. Kinney, Neb., 127 N. W. Rep. 239.

39. **Ejectment**—Adverse Possession.—In unlawful detainer, the older possession gives the better right, which is not defeated by a subsequent entry and occupation by the opposing claimant until it has ripened into title by adverse possession.—Gilchrist v. Atchison, Ala., 52 So. Rep. 955.

40.——Evidence.—In ejectment, the plaintiff must recover, if at all, on his title as it existed at the time of the commencement of the action, and evidence of any after-acquired title is inadmissible, unless the foundation therefor has been laid by a supplemental complaint, under the authority of a statute which permits the filing thereof in actions at law.—Bush v. Pioneer Mining Co., 179 Fed. Rep. 78.

41.——Possession—Conceding that a deed given as a mere security for an existing debt is not effective to transfer the legal title or right of possession of the mortgaged property from the grantor to the grantee, nevertheless the voluntary surrender of actual possession to the grantee as further security is lawful, and may be effective to create a legal right of posession sufficient to bar a right of recovery in an action of ejectment by the mortgagor against the mortgagee.—Sheridan v. Southern Pac. Co., C. C. A., 179 Fed Rep. 81.

42. **Eminent Domain**—Burden of Proof.—Facts showing the necessity for taking property by eminent domain must be proved, but need not be pleaded.—Northern Light & Power Co. v. Stacher, Cal., 109 Pac. Rep. 896.

43.——Evidence.—In assessing damages it is proper to consider all the capabilities of the property and its most advantageous uses.—McKnight v. City of Wichita, Kan., 109 Pac. Rep. 994.

44.——Remaindermen.—Where a railroad was built through land of a life tenant, the remaindermen on the death of the life tenant could recover compensation.—Bridges v. Southern Ry. Co., S. C., 68 S. E. Rep. 551.

45. **Equity.**—Bill of Review.—Errors subject to revision on appeal or on other like procedure may be the basis of a bill of review, but not every irregularity available to reverse on appeal will support a bill of review.—Vary v. Thompson, Ala., 52 So. Rep. 951.

46.——Forfeiture.—Equity always mitigates forfeitures or relieves against them when it can be done without doing violence to the contracts of the parties.—McCaskill v. Union Naval Stores Co., Fla., 52 So. Rep. 961.

47.——Indian Allottments.—A bill filed by the United States to cancel a large number of separate conveyances made by individual Indian allottees to the several defendants as invalid, because made in violation of a statute imposing restrictions upon the alienation of the land by the Indians, is not multifarious.—United States v. Allen, C. C. A., 179 Fed. Rep. 13.

48. **Evidence**—Admissions.—Admissions, made by one of two persons speaking different languages to the other through an interpreter, held not hearsay.—Terrapin v. Barker, Okl., 109 Pac. Rep. 931.

49. **Exchange of Property**—Rescission.—Where one who has exchanged property desires to rescind the contract and the other party forbids him to bring the property upon his place, no further tender by the first party is necessary.—Rose v. Eggers, Iowa, 127 N. W. Rep. 196.

50. **Executors and Administrators**—Land.—Land descends to the heirs and not to the personal representative, and every step he takes, in regard to the land, is an interference with the rights of the heirs.—Creel v. Creel, Ala., 52 So. Rep. 902.

51. **Exemptions**—Pensioner.—Where a pensioner mortgaged property purchased with pension money and then parted with the title to the property, he could not thereafter, on reacquiring title, defeat an action to foreclose the mortgage.—Omans v. Beeman, 124 N. Y. Supp. 166.

52. **Extortion**—Indictment.—In a prosecution under an indictment charging extortion by means of threats, accused could be convicted, not only if he wrote the threatening letters himself, but also if he acted in conjunction with those who did write them. People v. Adrogna, 124 N. Y. Supp. 68.

53. **Fraud**—Action.—One loaning money to a purchaser held not entitled to sue the vendor to recover the same on the ground of fraud.—Murphree v. Clisby, Ala., 52 So. Rep. 907.

54. **Frauds, Statute of**—Pleading.—In a case wherein a complaint is silent as to whether the contract is oral or written, to defeat the action the question of the statute must be pleaded by answer and cannot be raised by demurrer.—Levy v. Ryland, Nev., 109 Pac. Rep. 905.

55. **Fradulent Conveyances**—Preference.—A debtor, even in failing circumstances, may in good faith dispose of his entire property for the purpose of paying a portion of his debts, although other debts are left unsatisfied.—Anchor Buggy Co. v. Houtchens, Wash., 109 Pac. Rep. 1019.

56. **Guaranty**—Recovery.—In an action against a guarantor, defendant held entitled to show under a general denial that a less amount than that claimed by plaintiff was due.—Ebling Brewing Co. v. Weisel, 124 N. Y. Supp. 73.

57. **Homestead**—Lien.—A judgment obtained against a homestead debtor after the acquisition of a homestead right held not to create a lien on the homestead, which can be enforced while it retains its homestead character in the hands of the debtor.—Hansen v. Jones, Or., 109 Pac. Rep. 868.

58.——Partnership.—A partner, by mortgaging his homestead to secure a firm debt, waived his homestead exemption.—Bramlett v. Kyle, Ala., 52 So. Rep. 926.

59. **Judicial Sales**—Vacating.—A properly advertised and fair sale, in proceedings by a creditor to collect his debt, will not be vacated for mere inadequacy of price.—Roy v. O'Neill, Ala., 52 So. Rep. 946.

60. **Insurance**—Breach of Contract.—Where a life insurance company sold out its business, so as to incapacitate itself to collect premium notes upon which its agent's commission depended, held, that the agent could recover for an involuntary breach before the time of performance arrived.—Israel v. Northwestern Nat. Life Ins. Co., Minn., 127 N. W. Rep. 187.

61.——Cancellation.—Withdrawal of a policy by the insurer before it goes into effect held not a cancellation, of which insured must have notice.—Walrath v. Hanover Fire Ins. Co., 124 N. Y. Supp. 54.

62.——Waiver.—If a fire insurance company refuses to receive proof of loss on the ground that the policy was not in force, it waives proof of loss.—Havlik v. St. Paul Fire & Marine Ins. Co., Neb., 127 N. W. Rep. 248.

63. **Intoxicating Liquors**—Estoppel.—Principal and sureties on a liquor dealer's bond held estopped, in an action for civil damage to a widow because of the death of her husband, to question the validity of the bond as a statutory bond.—Kirkpatrick v. Phillips, Mich., 127 N. W. Rep. 340.

64. **Landlord and Tenant**—Estoppel.—The tenants of land are estopped, before surrendering possession, from asserting an outstanding title which has been granted to them.—Sayers v. Tallassee Falls Mfg. Co., Ala., 52 So. Rep. 892.

65.——Misrepresentations.—A tenant may show, in an action for rent, that representations as to material facts by the landlord were false.—Morton v. Hanes, Mich., 127 N. W. Rep. 269.

66. **Libel and Slander**—Evidence.—Proof of language substantially similar to the defamatory words alleged is sufficient, though where a defamation is reduced to writing complete certainty is necessary.—Corker v. Sperling, Ga., 68 S. E. Rep. 557.

67.——Justification.—Matter pleaded as justification in libel and slander, not being as broad as the charge, held not a justification.—Morley v. Combs, 124 N. Y. Supp. 19.

68. **Limitation of Actions**—Discovery of Fraud.—The statute does not begin to run against an action by a cestui que trust till the time of the discovery by the latter of fraud or mistake on which it is based.—Levy v. Ryland, Nev., 109 Pac. Rep. 905.

69.——Infant.—An heir who was only 15 years old when the interest of a dowress ceased on her death in 1893, was not barred by the 10-year statute from suing for partition in December, 1907.—Anglin v. Broadnax, Miss., 52 So. Rep. 865.

70. **Master and Servant.**—Independent Contractor.—As the servant of a painter and the servant of a carpenter, an independent contractor, both at work on the same building, were not fellow servants, the painter would be liable for an injury to the servant of the carpenter, because of the falling of the painter's ladder through the negligence of his servant.—Haxer v. Griessel, Mich., 127 N. W. Rep. 309.

71.——Relief Department.—A railroad relief department contract held not invalid as contrary to public policy.—Day v. Atlantic Coast Line R. Co., C. C. A., 179 Fed. Rep. 26.

72.——Respondeat Superior.—A coal dealer, which hired a team and driver by the hour from another dealer to deliver coal from its yards, held the master of such driver while so working, and liable for an injury to a third person caused by his negligence.—Philadelphia & R. Coal & Iron Co. v. Barrie, C. C. A., 179 Fed. Rep. 50.

73. **Mines and Minerals**—Severance.—An instrument conveying oil, gas, and coal held to sever such minerals from the land making them subject to separate taxation and separate listing for taxation.—Mound City Brick & Gas Co. v. Goodspeed Gas & Oil Co., Kan., 109 Pac. Rep. 1002.

74. **Money Received**—Equity.—Where there was no agreement between plaintiff and defendant that defendent was to return money advanced on the purchase price of real property

if the negotiations failed, or at all, yet where equity and good conscience required him to do so the law implied a promise on his part.—Schaeffer v. Miller, Mont., 109 Pac. Rep. 970.

75. **Monopolies**—Interstate Commerce.—A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of Sherman Anti-Trust Act as in restraint of interstate trade and commerce; its effect on such commerce, if any, being indirect and incidental.—Virtue v. Creamery Package Mfg. Co., C. C. A., 179 Fed. Rep. 115.

76. **Mortgages**—Deed.—A deed absolute in form will not be held a mortgage except on convincing evidence that it was given as security for debt.—Washington Safe Deposit & Trust Co. v. Lietzow, Wash., 109 Pac. Rep. 1021.

77. **Municipal Corporations**—Ordinance.—A city ordinance imposing a liability on street contractor for injuries to others held not invalid as requiring the assumption of an obligation properly resting on the city and thereby increasing the cost to the property owners.—Gay v. Engebretsen, Cal., 109 Pac. Rep. 876.

78. **Negligence**—Public Policy.—Public policy requires that every one shall exercise reasonable care of his own person and property, and, when his failure to do this concurs with the mere negligence of another to cause the injury, there can be no recovery.—Florida Ry. Co. v. Dorsey, Fla., 52 So. Rep. 963.

79. **Newspapers**—Legal Notices.—A paper printed in a foreign language may not be within a statute requiring the publication of legal notices, where the statute contains nothing to indicate an intention to include such publication.—Tylee v. Hyde, Fla., 52 So. Rep. 892.

80. **Partition**—Caveat Emptor.—The rule of caveat emptor does not apply to judicial sales for partition, and representations of the officer making the sale are binding on the parties.—Peake v. Renwick, S. C., 68 S. E. Rep. 531.

81.——Tax Title.—The holder of a tax title held not a proper party defendant in a suit for partition.—McCamman v. Davis, Mich., 127 N. W. Rep. 329.

82. **Partnership**—Existence of.—Plaintiff held entitled to share in profits of an enterprise formulated by him, though his associates purported to expel him.—Westwood v. Crissey, 124 N. Y. Supp. 97.

83.——Good Faith.—It is an act of bad faith on the part of one general partner to engage, without the consent of or against the objections of his copartners, in a competing business.—Skolny v. Richter, 124 N. Y. Supp. 152.

84.——Homestead.—Where firm property and the homestead of one of the partners was mortgaged for a firm debt, the owner of the homestead could not compel the creditor to proceed against the firm property in exoneration of the homestead.—Bramlett v. Kyle, Ala., 52 So. Rep. 926.

85. **Perjury**—Indictment.—An indictment for perjury need only allege generally that the evidence was material, without seting forth the facts on which the materialty depends.—People v. Tillman, 124 N. Y. Supp. 44.

86. **Physicians and Surgeons**—Hospital.—A physician performing an operation on a patient at a hospital held not responsible for the acts of nurses and interne at the hospital in dressing the wound.—Reynolds v. Smith, Iowa, 127 N. W. Rep. 192.

87.——Negligence.—A physician is not required to be infallible in diagnosing a case or treating diseases, so that the fact that a patient's disease was different from what it was diagnosed to be was merely evidence of negligence.—Hamrick v. Shipp, Ala., 52 So. Rep. 932.

88. **Principal and Agent**—Act of Agent.—Where one refers another to a third person for information as authorized to act or answer for him, he is bound by the acts and statements of the third person.—Marx v. King, Mich., 127 N. W. Rep. 341.

89. **Property**—Severance.—When any part of the freehold, such as coal, minerals, sand, gravel, crops or fixtures, etc., are severed from the freehold, they become personalty, and an action of trover, detinue, or other personal action may be brought to recover the property as a chattel, or for damages for the conversion.—Aldrich Mining Co. v. Pearce, Ala., 52 So. Rep. 911.

90. **Quieting Title**—Equity.—Where the proper action to recover certain land is an action in ejectment, the mere fact that all the defendants cannot be joined in one action, and that a multiplicity of suits would thereby result, will not give equity jurisdiction.—Sayers v. Tallassee Falls Mfg. Co., Ala., 52 So. Rep. 892.

91.——Possession.—Equity has no jurisdiction to quiet title where defendants are in possession under claim of title.—Miscotten v. Hellenthal, Mich., 127 N. W. Rep. 324.

92. **Religious Societies**—Public Policy.—The contract between the Order of St. Benedict of New Jersey, a charitable corporation, and its members, by which the latter take the vow of poverty, and agree to convey all property acquired by them to the order, held not contrary to public policy and valid, and to make the order the owner of property earned by a member and held by him at his death, to the exclusion of his heirs.—Order of St. Benedict of New Jersey v. Steinhauser., C. C., 179 Fed. Rep. 137.

93. **Sales**—Interest.—Plaintiffs held entitled to interest on balance due for goods sold from the time payment should have been made up to the time it was actually made.—T. L. Langston & Co. v. R. C. Neely Co., Ga., 68 S. E. Rep. 559.

94.——Place of Contract.—A contract for the sale of goods is to be construed according to the law of the place where delivery is to be made or the contract is to be performed.—In re Pittsburg Industrial Iron Works, D. C., 179 Fed. Rep. 151.

95. **Specific Performance**—Contract.—A contract whereby plaintiff was to inherit the property of certain persons on their death held enforceable.—Townsend v. Perry, 124 N. Y. Supp. 143.

96. **Subrogation**—Securities.—One who, not voluntarily, but to protect his own rights, satisfies a debt for which another is primarily liable, may enforce against the latter all the securities, benefits, and advantages held by the creditor.—Murphee v. Clisby, Ala., 52 So. Rep. 907.

97. **Taxation**—Tax Deed.—A tax deed showing by its recitals that the sale was conducted in a manner contrary to law is void on its face.—Bryant v. Miller, Colo., 109 Pac. Rep. 959.

98 **Telegraphs and Telephones**—Contract on Tort.—An action by the addressee of a telegram against the company for failure to deliver the message is not one on contract, but in tort for failure to perform a duty imposed upon defendant by law.—Western Union Telegraph Co. v. Burris, C. C. A., 179 Fed. Rep. 92.

99. **Trusts**—Cestui que Trust.—In case of a trust resulting from the purchase of real estate by two persons and the taking of title in the name of one, the latter's possessions is considered in law that of the trustee, and his possession as trustee is the posession of the cestui que trust.—Levy v. Ryland, Nev., 109 Pac. Rep. 905.

100. **Vendor and Purchaser**—Default.—A vendor in default for failing to furnish a good title, may not terminate the rights of the purchaser.—Price v. Immel, Colo., 109 Pac. Rep. 941.

101.——Marketable Title.—A title will be deemed unmarketable if the question as to title is one on which other courts might entertain a different opinion.—Williams v. Bricker, Kan., 109 Pac. Rep. 998.

102. **Wills**—Construction—Under a will leaving testator's property to his wife and children, but with directions not to divide the property until the youngest child reached 21 years, a deed by the widow before the youngest child attained his majority held not to convey a right to possession until such child became of age.—Killgore v. Cranmer, Colo., 109 Pac. Rep. 950.

103.——Testamentary Capacity.—On an issue as to testamentary capacity, the jury may consider that testator has passed over the natural objects of his bounty and bestowed his property on others.—Lehman v. Lindenmeyer, Colo., 109 Pac. Rep. 956.